No. 14836

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ELMER G. COFFEY AND MRS. ELMER G. COFFEY, HUSBAND AND WIFE, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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This supplemental brief is submitted, first, to apprise the Court of a pertinent Fourth Circuit decision, rendered after our main brief was filed in the present case, and second, to refute appellees' unwarranted attack upon our Statement of the Case.

I

In an opinion dated December 21, 1955, the Fourth Circuit affirmed a judgment for the United States in *Porter* v. *United States,* — F. 2d —. That case is like those discussed in our main brief at fn. 7, pp. 25–26,[1]

[1] Hereinafter we shall refer to our main brief as "U. S. Br.", and to appellees' brief as "App. Br."

where the courts properly have refused to impose liability in a situation in which the claimant's proof establishes an accident but, except through conjecture or speculation or by piling inference on inference, fails to establish negligent conduct or scope of employment, as required by the Tort Claims Act.

Porter was an action by a soldier to recover damages sustained by his son when a hand grenade fuse of army origin, which the boy found near his home, exploded in his hand. The Porters lived in a civilian settlement about a mile from an active military reservation. The settlement was on property which formerly had been part of the reservation but which, some years before the accident, had been turned back to private ownership. The boy found the fuse at a nearby garbage dump. Alleging negligence of the Army in its custody of explosives, plaintiff introduced evidence that explosives had been found at the same spot previously, that, after it was notified, the Army investigated the area, found some explosives and destroyed them, but nevertheless military trucks were subsequently seen dumping trash there. There was no direct evidence that the trucks ever dumped explosives or that the drivers were on active duty at the time. The Government's evidence showed that training of soldiers under simulated battle conditions was conducted at the army post and that, despite precautions, persons living in the area would enter on the range and gather exploded or live ammunition; they would remove and sell the brass and other metals, and then discard the remainder. The plaintiff's argu-

ments were much like those advanced by appellees here, *viz,* that since the grenade was military in origin, it could not get to the dump without negligence, that it must be assumed there was negligence either in the dumping or in permitting the fuse to escape official custody, that Army negligence is the only reasonable explanation for the presence of the fuse at the place it was found, etc. The district judge, however, held that plaintiff had failed to meet his burden of proof with this meager evidence, indicating that it would be necessary to pyramid inference on inference to conclude that placing the fuse at the dump was the result of negligence of Army personnel who were acting within the scope of their employment. The district court opinion, relying primarily on *Rolon* v. *United States,* 119 F. Supp. 432 (D. C. P. R.), is reported at 128 F. Supp. 590.

The Court of Appeals affirmed, citing *United States* v. *Inmon,* 205 F. 2d 681 (C. A. 5), and *Rolon* v. *United States, supra.* Our main brief in the instant case referred to *Inmon* a number of times (U. S. Br. 17–19, 33), and discussed *Rolon* also (U. S. Br., fn. 7 at p. 25, and see pp. 17, 20, 23).

Factually, the *Porter* case is closely parallel to the case at bar. In both, a person was injured with an explosive object which unquestionably was military *in origin.* In both, the object was found not far from a military base. In both, the claimant failed to offer any direct proof of any negligent conduct by military personnel, while acting in their course of employment, which resulted in placing the object where it was found.

If anything, the *Porter* case is stronger for the claimant than this one, because unlike the present case, there the claimant was able to show that the Army had prior knowledge that explosives had been found at the very spot where the grenade was later picked up, and that military trucks were seen dumping trash in that specific dump. Nonetheless, both the district court and the Fourth Circuit held that the claimant could not meet his essential burden without piling inference on inference. The same is true in this case. As in *Porter,* this case should be dismissed because appellees failed to establish the factual elements which are conditions precedent to recovery under the Tort Claims Act.

II

Appellees' brief disputes our Statement of the Case. Their brief begins with an assertion that our presentation of certain facts "tend [*sic*] to distort the actual evidence," and follows with a point heading that certain of our statements of fact "are not supported by the evidence" (App. Br. 2, 4). Appellees then make reference to ten different statements in our Statement of the Case and argue that they are distortions and that they lack evidentiary support. The fact is, however, that, with possibly a single exception, every one of their challenges is thoroughly unwarranted and stems either from a misreading of our brief or from an over-zealous advocacy which ignores the Record references cited in our brief for each statement we made. While the Record will, of course, speak for itself, we believe it necessary to refute appellees' un-

justified attack on our Statement if only to avoid the possibility of their arguing that our failure to deny is acquiescence. We shall treat each item as summarily as we can:

1. Appellees challenge our statement (U. S. Br. 3), made with reference to the area around the Coffey, Waggoner and Livengood Ranches, that, "While some farming was done there, the area near the gulley was rough, rocky, and hilly terrain (R. 23)." The testimony of Oliver Osborne, describing the 1½–2-mile walk from the Coffey Ranch to the gulley, is: "Q. Can you describe, oh, the land that you were walking on, the kind of terrain you were on? A. Rough, hilly terrain, I would say. Q. Rocky? A. Fairly rocky, yes. Q. Was it being farmed around here? A. Yes." R. 23. We suggest that our statement is neither a distortion nor without support in the evidence.

2. Appellees challenge our statement (U. S. Br. 4) that Albert Osborne testified he had worked in the locality during some of the years between 1942–1948, that he knew the Navy had used "some of the general area for bombing ranges at that time," and that he was aware that the Navy had posted "Keep Off" signs near the ranges, citing R. 47–8, 52. The record supports that statement except that appellees may perhaps be correct in raising a question whether the signs he saw were at the ranges or at the airport. For, Osborne testified that "most" of the areas where he had been were airplane landing and take-off areas.

R. 47–8.[2] As to our statement that Osborne knew of bombing in the "general area," his testimony was that he had heard of the Zillah Bombing Range and—regardless of the physical geographical facts—*he* thought that the location of the town of Zillah in relation to the Coffey farm "*would be close,* but I doubt if it is ten miles [from the Coffey farm]. I think it is a *little* farther than that" (R. 52, emphasis added). We suggest, therefore, that our statement is not a distortion, but is a fair appraisal of the evidence.

3. Appellees (App. Br. 4) refer to pp. 4, 5 of our brief and say: "The sweeping statement is made that either Mr. Osborne or Appellee Coffey knew about bombing ranges in the general area or the possibility of bombs in the area." Our brief has no such statement. See item 2, above, for substantiation of what we did say as to Osborne. As to Coffey, our brief states: "While he later heard that there had been warnings publicized about the possibility of bombs in the area, he never heard about it before the accident, and he denied even knowing that there had been a bombing range in the area (R. 148–9)." U. S. Br. 5. We suggest that if there is distortion here, it lies only in what appellees said was in our brief.

4. Appellees (App. Br. 5) challenge our statement (U. S. Br. 4–5) as to the Osbornes' testimony that they "did not recognize the objects to be bombs (R. 24–25),

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[2] Captain Smith, however, testified unequivocably that, in accordance with instructions from the Chief of Naval Operations, the bombing ranges were posted with signs and were fenced with barbed wire (R. 199–200).

although in broad form they were similar to a bomb or dud which they knew appellee Coffey kept in his home (R. 49)." The testimony: "Q. In other words, it is about the same shape as Mr. Coffey's dud bomb that he has home? * * * A. If you are going to get real technical, I am going to say no, because the other one was a more spherical shape and longer and larger, and I think the other one has a corrugation on it. Q. I see. But they are very similar? A. In a way, yes. Q. In a way? A. Broad form, yes." R. 49. Thus, again, the record supports our brief.

5. Appellees (App. Br. 5) seem to challenge our statement (U. S. Br. 6) as to Coffey's testimony that he told his friend that the object "would have to be cleaned before putting it in the melting pot * * * [otherwise] 'you will have a small explosion' (R. 133–4)," and our statement (U. S. Br. 38) that he feared it would explode if it were put in the pot "in its raw state." The testimony appearing at R. 133–4 is almost identical with what we said.

6. Appellee's (App. Br. 6–7) challenge our statement (U. S. Br. 7) that the bomb is used only in horizontal bomb practice. The testimony of Chief Warrant Officer Dickey (R. 157 *et seq.*),[3] who is an ordnance expert, and of Capt. Smith (R. 191–2, 208

[3] R. 157–8: "* * * A. It is to be dropped from horizontal aircraft at 6,000 feet or above * * *. Q. I see. Is it used in other types of drops, that is, dive bombing or skip bombing, that type of bombing? A. No, it cannot be, due to the fact that it would be, as in this case, it would be a dud, is what we call a dud. * * *"

et seq.),[4] who had been in charge of the Pasco Air Station, as well as the Navy's technical manual (R. 162), fully confirm our statement. There certainly is no distortion.

7. Appellees (App. Br. 6) challenge our statement (U. S. Br. 7) that during the war years, the bombing area was enclosed by barbed wire fencing and warning signs were posted at intervals of about 200 feet. Here, again, the testimony at R. 199–200 is precisely as we stated it.[5]

8. Appellees (App. Br. 6) challenge our statement (U. S. Br. 8) that no violation of Navy Regulations prohibiting the dropping of ordnance anywhere except in approved areas was ever reported to Naval authorities. Appellees say the only evidence is that Captain Smith never heard of any violation. Ap-

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[4] R. 192: "Q. * * * were the activities in that area [Pasco] confined to dive bombing or skip bombing? A. Oh, yes, dive bombing and skip bombing. Q. Out of the Pasco Naval Air Station, were any level flight missions flown? A. Not for the purpose of dropping bombs. * * * Q. Showing you Defendant's Exhibit 12, was this type of bomb used? A. *It was not.* Q. It was not used in the Pasco operations at all? A. *No, sir.*" [Emphasis added.]

[5] R. 199–200: "Q. * * * Now, Captain, in regard to these bombing areas, were any safety precautions taken as to the areas themselves? A. Yes, they were posted, in accordance with instructions from the Chief of Naval Operations, and they were fenced, all of them were fenced with 3-strand barbed wire fence. Q. What did these regulations require as to posting and fencing? A. I don't remember at this time what the interval was that we posted around there. Q. To the best of your recollection, what was the interval? A. I would say it must have been around 200 feet, but I can't guarantee that. Q. Were these operations carried out in respect to these areas? A. Yes, sir."

pellees ignore Captain Smith's further testimony that if any violations had been reported, they would have come to his attention because of the position he held (R. 199).

9. Appellees (App. Br. 7) challenge our statement that McKnight found bombs or fragments "within an area of some 3 acres on the Livengood property" (U. S. Br. 9) and that he found these in the general vicinity of the place in which the Osbornes picked up the objects (U. S. Br. 20). Appellees say that the testimony "conclusively shows" that all were found "in the same place." We think our statement is a more objective characterization of the evidence (R. 102–104) than appellees'; theirs is argumentative and conflicts with the testimony of Oliver Osborne (R. 33) that there were no other objects near the ones he and his brother found.

10. Appellees' discussion (App. Br. 7–8) of the expert testimony concerning the markings on the various bombs and fragments is plainly argumentative rather than a challenge of the particular statement we made in our Statement of the Case (U. S. Br. 10) which did not deviate from the Record. Reference to the Record shows clearly that the expert testimony concerning the objects found by the Osbornes and concerning those found by McKnight was in fact different. See U. S. Br. 9–10, and fn. 5 at p. 21.

Whatever may be said about the conclusions that counsel may wish to deduce from the total of the evidence introduced, there can be no obscurity as to what the witnesses did or did not say. We believe

the Statement of the Case in our main brief is a fair paraphrasing of the testimony given, that it contains no distortion, and that it is amply supported by Record citations. Appellees' attack on our Statement is without merit and serves only to becloud the principal issue which is whether appellees introduced any evidence which establishes that the injuries were caused by negligent conduct of federal employees while acting within the scope of their employment. For this appellees rely on double and triple inferences, speculation and guesswork. Legal liability, we submit, should rest on a firmer base than that.

CONCLUSION

For the reason stated in our main brief, it is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint and to enter judgment for the United States.

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